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Nos. 80-1538 and 80-1934

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER and STATE OF TEXAS, et al.,
Appellants,

v.

J. and R. DOE, as guardian ad litem for I. DOE, et al.,
Appellees.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY,
Appellants,

v.

UNITED STATES OF AMERICA,
Intervenor - Appellee,

and

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN,
Appellees.

On Appeal From the United States Court of Appeals
for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

Mountain States Legal Foundation respectfully moves this Court, pursuant to rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief *amicus curiae*. In support of this motion, the Foundation states:

1. Mountain States Legal Foundation is a nonprofit, public interest law firm. The Foundation is supported entirely by donations from its members and is dedicated to the legal advocacy of the values and concepts of individual liberties and economic freedom. In addition, the Foundation is dedicated to preserving, through legal advocacy, the constitutional balance of national and state powers.

2. The issues involved in this case — whether undocumented aliens are entitled to equal protection of the laws and if so, the extent of such protection — will have a far-reaching impact on those individuals and states directly affected by illegal immigration into the United States. An examination of this impact on the American public is crucial to a well-reasoned resolution of the present controversy. As *amicus curiae*, the Foundation seeks to bring before this Court fundamental considerations which form the basis of individual liberties and states' rights and that underscore the need for clarifying the legal rights of undocumented aliens.

3. These considerations, while directly applicable to the instant case, transcend the specific interests of the parties, and thus may not be adequately addressed by the existing parties. Because Mountain States Legal Foundation has previously participated in cases testing equal protection issues on behalf of the public interest, it respectfully submits that it can serve a useful role as *amicus* in this case.

4. Letters indicating the consent of the parties to the Foundation's participation as *amicus curiae* will be filed under separate cover with the clerk of the Court.

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that its Motion for Leave to File the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICUS CURIAE

Mountain States Legal Foundation is a nonprofit, public interest law firm. The Foundation is supported entirely by donations from its members and is dedicated to the legal advocacy of the values and concepts of individual liberties and economic freedom. In addition, the Foundation is dedicated to preserving, through legal advocacy,

the constitutional powers of the states, especially where the subject matter involves a traditional state function, such as education. As *amicus curiae*, the Foundation seeks to bring before this Court fundamental considerations which form the basis of individual liberties and states' rights. These considerations underscore the need to clarify the legal rights of undocumented aliens, and the rights of the states to deal with acute local problems created by illegal immigration into the United States. Because the issues in the present case will have a significant impact on the public at large and on the development of constitutional law, they transcend the specific interests of the parties, and thus may not be adequately addressed by the existing parties.

SUMMARY OF ARGUMENT

All persons physically within the United States, including undocumented aliens, are entitled to due process of law to insure they are not deprived of life, liberty or property without adequate procedural safeguards. But due process rights do not give undocumented aliens the right to demand state benefits under equal protection of the laws.

This Court has accorded aliens an ascending scale of constitutional rights, depending upon the degree to which they have become assimilated into our society. Within this ascending scale of constitutional protections, only lawfully admitted resident aliens have been afforded equal protection of the laws.

An alien's right to equal protection is the result of a congressional decision to admit resident aliens to permanent residence on an equality of legal privileges with citizens. This equality includes equal protection under state laws. But such is not the case with undocumented

aliens. Because Congress has not permitted them to enter the United States, Congress has not extended to them any guarantee of equal protection under state laws. Therefore, undocumented aliens have no constitutional claim to share in state benefits.

However, if this Court decides that undocumented aliens are entitled to equal protection rights, the appropriate standard of judicial review would be the rational basis test. First, undocumented aliens are not a suspect class. Their legal disabilities are not the result of an "unalterable trait," but rather, are the result of their own decision to enter this country in violation of federal immigration laws. Thus, they have chosen to classify themselves.

Second, education is not a fundamental right. Because undocumented aliens do not have the right to work in this country, nor the right to participate in state and federal political processes, the denial of education to undocumented aliens does not interfere with the exercise of other fundamental rights.

Finally, it would be fundamentally unfair to women, to illegitimate children, to the elderly and to all other non-suspect minority groups, to apply strict scrutiny to classifications based upon illegal entry into this country. The application of strict scrutiny would also be unfair to those aliens who have complied with federal immigration laws and have made a commitment to the United States.

Under the rational basis test, section 21.031 of the Texas Education Code is rationally related to preserving the fiscal integrity of state education programs. The statute allows the state of Texas to deal rationally with the difficult task of allocating limited state benefits while its illegal resident population continues to grow.

The court of appeals correctly decided that section 21.031 is not preempted by federal law. First, Congress has not expressed any intent to preempt the field of educating undocumented aliens; second, education is a matter of local rather than federal concern; and third, by restricting undocumented aliens from receiving a state-funded education, the Texas statute frustrates no federal policy with regard to the immigration or education of undocumented aliens.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT ENCOMPASS UNDOCUMENTED ALIENS.

The legal issues presented in the instant case are ones of first impression. For the first time this Court is called upon to determine whether undocumented aliens are entitled to equal protection of the laws.

The cases in which this Court has determined the constitutional rights of aliens illustrate that aliens have been afforded an ascending scale of constitutional guarantees, depending upon their lawful admission into the United States and the conditions imposed by Congress upon their entry. Within this ascending scale of constitutional protection, only lawfully admitted resident aliens have been afforded equal protection of the laws. Because undocumented aliens have entered this country in violation of federal immigration laws, they are not entitled to an equality of legal privileges with citizens and lawfully admitted resident aliens.

A. *Undocumented aliens have basic constitutional rights under the due process clause; however, equal protection rights are not coextensive with due process rights.*

Freedom from arbitrary state deprivations of life, liberty and property is guaranteed by the due process clause of the fourteenth amendment. Entitlement to share in the benefits of a state's largess, however, is encompassed by the equal protection clause. U.S. Const. amend. XIV. These two constitutional provisions are fundamentally different and not coextensive. Therefore, even though undocumented aliens have basic constitutional rights to procedural due process, they are not automatically entitled to the constitutional guarantee of equal protection in claiming benefits generated by taxpayer dollars.

For example, in *Dandridge v. Williams*, 397 U.S. 471 (1970), this Court held that a state welfare regulation which placed a maximum limit on family welfare benefits did not violate the petitioner's rights to equal protection. In upholding the regulation, this Court distinguished the procedural protections afforded at the termination of benefits from the right of an individual to demand such benefits from the state:

> The Constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg v. Kelly*, 397 U.S. 254. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

397 U.S. at 487.

Similarly, in *Maher v. Roe*, 432 U.S. 464 (1977), this Court held that while a state could not deprive a woman

of her fundamental right to have an abortion, it need not provide indigent women with funds to pay for abortions. *See also, Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J. concurring).

These cases illustrate that due process rights are not synonymous with equal protection rights. Indeed, this Court has specifically recognized that "the two protections are not always coextensive." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

The same concepts apply to undocumented aliens. First, it is undisputed that undocumented aliens are entitled to due process of law. *Matthews v. Diaz*, 426 U.S. 67 (1976); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) In *Matthews*, this Court emphasized, "[e]ven one whose presence in this country is unlawful . . . is entitled to that protection." *Id.* at 77. The implication of this statement is that undocumented aliens are not necessarily entitled to other constitutional protections.

Second, not all classes of aliens are afforded the same degree of constitutional protection. *Compare Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (nonresident aliens are not entitled to constitutional due process) *with Matthews v. Diaz, supra,* (all persons physically present within the United States are entitled to procedural due process) *and Graham v. Richardson*, 403 U.S. 365, 371 (1971) (lawfully admitted resident aliens are entitled to equal protection). As Justice Jackson stated in *Johnson v. Eisentrager:*

> *The alien*, to whom the United States has been traditionally hospitable, *has been accorded a generous and ascending scale of rights as he increases his identity with our society.* Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they

> become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. (Emphasis added.)

339 U.S. 763, 770 (1950).

The most basic and fundamental of all constitutional rights is the right to due process of law. It is only fitting that this constitutional guarantee should be extended to all persons, including those whose presence in this country is unlawful, to insure they are not deprived of life, liberty or property without adequate procedural safeguards. But due process rights do not give undocumented aliens the right to demand state benefits under equal protection of the laws. As noted above, aliens have been afforded an ascending scale of constitutional rights, depending upon the degree to which they have become assimilated into our society. Within this ascending scale of constitutional protection, undocumented aliens are entitled to due process of law, but equal protection is a constitutional guarantee extended only to those aliens lawfully admitted by Congress.

B. *The equal protection clause does not encompass undocumented aliens because Congress has not extended to them the right to enter the United States on an equality of legal privileges with citizens and lawfully admitted aliens.*

While due process rights are based upon physical presence in the United States, equal protection rights are based upon an alien's legal status in this country. It is congressional permission to enter the United States that implies equal protection of the laws. Conversely, there is no implied right to equal protection in the absence of lawful entry.

Undocumented aliens have some of the same status characteristics as both nonresident aliens and lawfully ad-

mitted resident aliens. Undocumented aliens, like lawfully admitted aliens, are physically within the territory of the United States. They are like nonresident aliens, however, because Congress has not granted them permission to enter the United States. It is logical, therefore, to determine the rights of undocumented aliens by analyzing the rights of these other two groups.

A nonresident alien has no constitutional right to enter the United States. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). Indeed, nonresident aliens have no constitutional rights at all; they are entitled only to the proper functioning of the immigration laws as established by Congress. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

In contrast, lawfully admitted aliens are entitled to constitutional protection. Congressional permission to enter the United States endows an individual with certain constitutional rights. For example, in *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950), this Court stated, "the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection."

In *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), this Court held that California could not prohibit lawfully admitted aliens from fishing in coastal waters while permitting all others to do so. There it was said:

> The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all person *lawfully* in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws. (Emphasis added.)

334 U. S. at 420. *See also, Truax v. Raich*, 239 U.S. 33, 39 (1915).

This reasoning was specifically relied upon in *Graham v. Richardson*, 403 U.S. 365, 374, 378 (1971), where this Court held that legal alienage is a suspect classification for purposes of the equal protection clause:

> [A]liens *lawfully* within this country have a right to enter and abide in any State in the Union on an "equality of legal privileges with all citizens under non-discriminatory laws." (Emphasis added.)

Id. at 378, quoting *Takahashi*.

The reasoning articulated by this Court in *Takahashi* and relied upon in *Graham* makes clear that lawful admission is the basis of an alien's right to equal protection. In addition to lawful entry, however, the conditions of entry imposed by Congress also determine equal protection rights.

For example, resident aliens have a constitutional right to work in the United States because their lawful admission to permanent residence confers this privilege. *Truax v. Raich*, 239 U.S. 33, 43 (1915). Certainly Congress would not have admitted these aliens to permanent residency without the corollary right to survive in our society.

On the other hand, nonimmigrant aliens admitted to temporary residence do not have equal opportunity of employment because Congress has not granted them this privilege. *Pilapil v. Immigration & Naturalization Service*, 424 F. 2d 6 (10th Cir. 1970). In *Pilapil*, the petitioner, lawfully admitted to the United States on a student visa and subject to deportation, argued that he had a constitutional right to work. In rejecting this argument the court of appeals stated:

> Before this limited status was granted to [the student], he had no rights under the Constitution,

> laws or government of the United States . . . . The limited status given him as an alien student had some specific conditions attached . . . . He acquired only the limited status established by the conditions.
>
> . . . .
>
> Therefore, no rights under the Constitution of United States relative to equal opportunity of employment are involved.

Id. at 11.

The conditions and terms of entry into the United States are solely within the discretion of Congress. *Fiallo v. Bell*, 430 U.S. 787, 794 (1977). Moreover, this Court has specifically recognized that Congress, in its discretion, may restrict the equal protection rights of aliens:

> Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country. Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence. (Emphasis in original.)

Matthews v. Diaz, 426 U.S. 67, 80 (1976).

Because Congress has the power to grant or restrict the constitutional rights of aliens, the states may not impose restrictions on aliens that conflict with congressional intent. In *Graham v. Richardson, supra*, this Court stated with regard to indigent aliens:

> Congress has broadly declared as federal policy that lawfully admitted resident aliens who become public charges . . . are not subject to deportation, and that as long as they are here they are entitled to the full and equal benefit of all state laws . . . .

403 U.S. at 378. *See also, Takahashi, supra*, 334 U.S. at 419. In contrast, the states may impose restrictions on aliens that are harmonious with federal restrictions. *De Canas v. Bica*, 424 U.S. 351 (1976) (upholding a California statute prohibiting the knowing employment of illegal aliens).

Thus, an alien's right to equal protection is the product of a federal decision to admit resident aliens to permanent residence *without restriction*. The states may not restrict the equal protection rights of lawfully admitted aliens because Congress has extended to them full equal protection of state laws.

But such is not the case with undocumented aliens. Because Congress has not permitted them to enter this country, Congress has not extended to them any guarantee of equal protection under state laws. As a result, undocumented aliens do not share an equality of legal privileges with citizens and lawfully admited resident aliens, and do not have a constitutional claim to share in state benefits. Therefore, the states, by weighing policy considerations, may restrict undocumented aliens from sharing state benefits, so long as the restriction does not interfere with federal power over immigration and foreign affairs. As *amicus* will demonstrate in section IV of this brief, the challenged Texas statute does not interfere with federal power over immigration.

II. IF THIS COURT DETERMINES THAT UNDOCUMENTED ALIENS ARE ENTITLED TO EQUAL PROTECTION RIGHTS, THE APPROPRIATE STANDARD OF JUDICIAL REVIEW IN THE PRESENT CASE WOULD BE THE RATIONAL BASIS TEST.

The court of appeals below did not decide directly whether section 21.031 of the Texas Education Code should be reviewed under a rational basis standard or some more stringent test of judicial scrutiny. This Court, however, has determined that strict judicial scrutiny is applicable only where state action involves a fundamental right or a suspect classification. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967). Absent these strict scrutiny categories, a statute need only be supported by "some rational relationship to legitimate state purposes." *Rodriguez*, 411 U.S. at 40.

The present case involves neither a fundamental right nor a suspect classification. Moreover, it would be fundamentally unfair to citizens and lawfully admitted aliens to apply strict judicial scrutiny to classifications based upon illegal immigration status. For these reasons, the appropriate standard of judicial review in the present case is the rational basis test.

A. *The rational basis standard is appropriate because undocumented alien status is not a suspect classification under the equal protection clause.*

This Court has determined that "certain classifications based on unalterable traits . . . are inherently suspect and must be justified by some 'overriding statutory purpose.'" *Lindsey v. Normet*, 405 U.S. 56, 73 (1972). Three distinct classes have been recognized as suspect for purposes of equal protection: (1) race, *Loving v. Virginia*, 388 U.S. 1

(1967); (2) national origin, *Korematsu v. United States*, 323 U.S. 214 (1944); and (3) legal alienage, *Graham v. Richardson*, 403 U.S. 365 (1971). These three classes not only represent "discreet and insular" minorities, *id.* at 372, but each represents an unalterable trait.

In *Nyquist v. Mauclet*, 432 U.S. 1 (1977), Justice Powell recognized that a status which an individual is powerless to change is an important factor in determining a suspect classification:

> [A]liens residing in this country necessarily are subject to a period of time during which they *must* bear this status of "alien." Nothing except time can remove him from his identified status as an "alien" and from whatever associated disabilities the statute might place on one occupying that status. In this sense, it is possible to view aliens as a discrete and insular minority, since they are categorized by a factor beyond their control. (Emphasis in original.)

Id. at 18-19 (Powell, J. dissenting).

Justice Powell's reasoning was adopted by this Court in two later cases. In *Foley v. Connelie*, 435 U.S. 291, 294, n.3 (1978), the Court noted that a lawfully admitted alien's status is beyond his or her control since Congress has imposed a five-year residency requirement before an alien may attain citizenship. And in *Ambach v. Norwick*, 441 U.S. 68 (1979), this Court upheld a New York statute barring those aliens who refused to seek naturalization from teaching in the public schools. In applying a rational basis standard, this Court found determinative that the aliens had "chosen to classify themselves" by refusing to apply for United States citizenship. *Id.* at 80.

Thus, race, nationality and the legal status of alienage are traits which an individual is powerless to control. How-

ever, when legal disabilities are the result of an individual's own affirmative actions, a classification based upon those disabilities is not suspect.

Such is the case with undocumented aliens. Their legal disabilities are not the result of an unalterable trait but are the result of their own decision to enter this country in violation of federal immigration laws. Neither Congress nor the states have required them to bear the status of undocumented aliens; rather, they have "chosen to classify themselves." *Id.* Because undocumented alienage is not a status beyond the individual's control, it lacks one of the indicia this Court has always used in determining suspect status. Therefore, undocumented alienage is not a classification requiring strict judicial scrutiny.

Finally, this Court's holding in *De Canas v. Bica*, 424 U.S. 351 (1976), offers further support for applying a rational basis standard in the present case. In *De Canas* the exclusive federal power to regulate immigration did not preempt a California statute prohibiting the knowing employment of illegal aliens. Although equal protection of illegal aliens was not in issue, the Court in *De Canas* applied equal protection terminology to find that the protection of California's lawfully resident labor force and economy were "vital state interests" and that the legislation was "tailored to combat effectively the perceived evils." 424 U.S. at 357. Implicit in this holding is that both the statute and the classification based on illegal entry were rational. While it might be argued that California's interest in protecting is economy was compelling rather than merely rational, this Court has held in several cases that a state's concern for fiscal integrity, while legitimate, is not a compelling state interest for equal protection analysis. *Graham v. Richardson*, 403 U.S. 365 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). Accordingly, the holding in *De Canas* implies that classifications based upon ille-

gal immigration status are not suspect and therefore, the appropriate standard for reviewing such classifications is a rational basis test.

B. *The rational basis standard is appropriate because undocumented aliens do not have a fundamental right to a state-funded education.*

This Court has already decided that education is not a fundamental right. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Consequently, not even citizens of the United States have a constitutional right to receive a state-funded education. Clearly then, undocumented aliens, whose presence in this country is unlawful, are not guaranteed an education by our Constitution.

Nevertheless, appellees argued in the district court and court of appeals below that because *Rodriguez* dealt only with relative differences in education spending levels, this Court left open the question of whether a denial of access to education might involve a fundamental right. *Amcius* strongly disagrees that this question remains unresolved after *Rodriguez*. In *Ambach v. Norwick*, 441 U.S. 68 (1979), this Court stated in dictum that "access to education is not guaranteed by the Constitution." *Id.* at 77, n. 7. However, even if this question remains unanswered after *Rodriguez*, the instant case does not offer the opportunity to resolve this issue at the present time.

Although education is not itself a fundamental right, this Court recognized in *Rodriguez* that education is related to the effective exercise of first amendment rights and the intelligent utilization of the right to vote. *Id.* Further, this Court noted that appellees' arguments in *Rodriguez* might have had more immediacy had education been absolutely denied because a total denial could interfere with an individual's "full participation in the political process."

Id. at 37. Thus, a denial of education conceivably could involve a deprivation of a fundamental right, in some cases, if it seriously interfered with an individual's exercise of other fundamental rights, particularly his or her ability to participate in the political process.

But undocumented aliens do not have a right to participate in state or federal governmental processes. Unlike lawfully admitted aliens, they do not have the opportunity to become citizens and ultimately enjoy the right to vote. The denial of education to undocumented aliens therefore does not interfere with the exercise of political rights.

Furthermore, although education is related to the effective exercise of other fundamental rights, this Court recognized in Rodriguez that food, clothing and shelter are perhaps even more important than education to full participation in the political process. *Id.* at 37. If this Court were to find that access to education is fundamental, then logically, access to food, clothing and shelter would also be fundamentally necessary to the effective exercise of constitutional rights. A denial by a state of welfare benefits would then become a denial of a fundamental right, thus undermining this Court's decision in *Dandridge v. Williams*, 397 U.S. 471 (1970). Similarly, an eviction proceeding enforced through a state court would represent a denial of the fundamental right to housing, thus undermining *Lindsey v. Normet*, 405 U.S. 56 (1972). An additional question this Court would face is identifying how much education, food, clothing or shelter is constitutionally required to insure the meaningful exercise of other constitutional rights. As this Court stated in *Rodriguez*, "the logical limitations on appellees' nexus theory are difficult to perceive." 411 U.S. at 37.

Finally, a decision that undocumented aliens are entitled to a state-funded education would be inconsistent with *De Canas v. Bica*, 424 U.S. 351 (1976), where this

Court upheld, under the preemption doctrine, a state statute prohibiting the employment of undocumented aliens. Clearly, *De Canas* stands for the proposition that undocumented aliens do not have the right to work in this country. Consequently, the right to provide one's family with food, clothing and shelter are not fundamental interests as far as undocumented adults are concerned, and yet respondents urge this Court to find that undocumented children should have a fundamental right to a state-funded education. Because undocumented aliens cannot legally work in this country, nor can they vote or otherwise participate in state or federal political processes, there are no overriding policy considerations to justify a finding that undocumented aliens have a fundamental interest in a state-funded education.

C. *It would be fundamentally unfair to citizens and lawfully admitted aliens to apply strict scrutiny to classifications based upon illegal entry into the United States.*

In section II A of this brief, *amicus* demonstrated that all suspect classifications involve an unalterable trait. The converse, however, is not true: all unalterable traits are not suspect. Thus, this Court has not applied strict judicial scrutiny to classifications based upon sex, *Craig v. Boren*, 429 U.S. 190 (1976); illegitimacy, *Matthews v. Lucas*, 427 U.S. 495 (1976); or age, *Vance v. Bradley*, 440 U.S. 93 (1979). In *Matthews* this Court specifically noted that women in the United States have been historically subjected to severe and pervasive discrimination, 427 U.S. at 506, and yet women have not been accorded suspect status for equal protection purposes. *Amicus* therefore submits that it would be fundamentally unfair to all non-suspect minority groups to apply strict judicial scrutiny to classifications based upon illegal entry into this country. Surely the framers of the Constitution could not have intended

that persons who have entered the United States illegally, and whose presence here remains unlawful, should receive greater constitutional protection than minority citizens of the United States.

Moreover, it would be fundamentally unfair to resident aliens, lawfully admitted by Congress, to apply strict scrutiny in the present case. Lawfully admitted aliens have entered this country in compliance with federal immigration laws and their constitutional rights stem from a congressional decision which extends to them an equality of legal privileges with citizens. If this Court were to hold that undocumented aliens are entitled to the same degree of constitutional protection as documented aliens, not only would federal immigration laws become meaningless, but congressional power to extend or restrict the legal privileges of aliens would be seriously undermined.

For these reasons, *amicus* urges this Court, in considering the equal protection merits of the present case, to apply a rational basis standard of judicial review.

III. SECTION 21.031 OF THE TEXAS EDUCATION CODE IS RATIONALLY RELATED TO PROTECTING THE FISCAL INTEGRITY OF THE STATE'S EDUCATION PROGRAMS.

Because federal immigration laws are not adequately enforced, many border states, including Texas, are faced with the difficult task of allocating limited state benefits while their illegal resident population continues to grow. Under these circumstances, the states should be afforded the opportunity to weigh policy considerations and formulate rational solutions to their fiscal dilemmas.

Under the rational basis test, state regulations do not violate the equal protection clause so long as they bear *some* rational relationship to the state's objectives. The method chosen by the state to solve its social or economic problems need not be the best solution or even the wisest solution to the problem. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). Moreover, this Court has recognized that it is not within a court's province to substitute its judgment for that of the state legislature. *Id.*

The court of appeals below found that section 21.031 was not rationally related to any state objective. While purporting to recognize the principles stated above, the court reached its decision by substituting its own judgment for that of the Texas legislature. For example, the court noted that if Texas were truly interested in discouraging immigration, it would have enacted the measure *most* likely to achieve this goal — a statute prohibiting employers from employing illegal aliens. 628 F.2d at 461. The court of appeals was clearly erroneous in even considering its own alternatives to Texas' problems.

Section 21.031 serves the main objective of protecting the fiscal integrity of Texas education programs. Just as California has a legitimate interest in protecting its law-

fully resident labor force and economy (*De Canas v. Bica*, 424 U.S. 351 (1976)), Texas has a legitimate interest in protecting the educational quality of its programs by preventing the drain on local education funds caused by an increase in illegal immigration. The Texas statute, by denying a state-funded education to undocumented alien children, rationally serves this purpose.

An additional objective advanced by the state in the Fifth Circuit is the discouragement of illegal immigration. Surely section 21.031 is rationally related to this objective since it removes one incentive for undocumented aliens to immigrate. Further, the Texas statute discourages undocumented aliens from immigrating with their entire families and setting up long-term residence in this country.

Although illegal immigration is a national problem, it is particularly acute in the border states. The state of Texas, by enacting section 21.031, has attempted to rationally deal with this aggravated local problem while providing its lawfully resident population an adequate educational system. Because the Texas statute is rationally related to state objectives, it does not violate the equal protection clause.

IV. THE COURT OF APPEALS CORRECTLY DECIDED THAT SECTION 21.031 OF THE TEXAS EDUCATION CODE IS NOT PREEMPTED BY THE IMMIGRATION AND NATIONALITY ACT OR BY TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT.

In *De Canas v. Bica*, 424 U.S. 351, 355 (1976), this Court distinguished between regulation of immigration, which is an exclusive federal power, and regulation of aliens, an area in which the states possess legislative power. Immigration was narrowly defined in *De Canas* as a "determination of who should or should not be admitted into this country, and the conditions under which a legal entrant may remain." *Id.* at 355. Moreover, this Court recognized that a state regulation of aliens which has a "purely speculative and indirect impact on immigration" is not constitutionally impermissible. *Id.* at 355-56. A state regulation of aliens is invalid under the supremacy clause, U.S. Const. art. VI § 2, only if: (1) Congress has expressed its intent to preempt the field in question, *id.* at 356; (2) the subject matter of the regulation is exclusively federal, *id.*; or (3) the state regulation frustrates congressional purposes, *id.* at 363. None of these conditions is present in the instant case.

A. *Congress, by enacting the Immigration and Nationality Act and the Elementary and Secondary Education Act, did not intend to preempt the states from regulating the education of undocumented aliens.*

As a preliminary premise, this Court stated in *De Canas* that unless the "clear and manifest purpose of Congress" to preempt state legislation could be demonstrated explicitly in a federal statute or in its legislative history, such intention would not be presumed by this Court. *Id.*

at 357-58. Therefore, the challenged Texas statute is valid unless Congress has clearly expressed its intent to preempt the field of educating undocumented aliens.

With regard to the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101-1503 (1976), neither the language of the INA nor its legislative history indicates any preemptive congressional intent. The statute is completely silent as to the right of the states to restrict undocumented aliens from receiving a state-funded education. Furthermore, as this Court held in *De Canas*, the "central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *Id.* at 359. The INA is not concerned with the employment of undocumented aliens, *id.*, nor is it concerned with the education of undocumented aliens.

The second federal statute involved in the present case is Title I of the Elementary and Secondary Education Act (ESEA), 20 U.S.C. §§ 2701-2854 (Supp. II 1978). Like the INA, Title I of the ESEA evidences no clear congressional intent to preempt the field of educating undocumented aliens. As the court of appeals noted, this program is simply a funding measure for a comprehensive aid-to-state education program which provides specific funds to assist the states in meeting the special educational needs of children. 628 F.2d at 453. The program is completely voluntary with regard to state participation; the act establishes eligibility criteria for the states to follow in order to qualify for federal funds and, if these criteria are not met, federal funds are withheld.

Neither the language of the ESEA nor its legislative history indicates a clear congressional mandate that educationally disadvantaged children shall include undocumented aliens. The statute is silent on this issue. But even if Title I was meant to include undocumented children,

the statute does not manifest a congressional intent to preempt the field of education with regard to the specific programs covered in the act.

Thus, Congress, by enacting the Immigration and Nationality Act and the Elementary and Secondary Education Act did not intend to preempt the field of educating undocumented aliens. Therefore, section 21.031 of the Texas Education Code is a valid exercise of state regulatory power.

B. *Texas may regulate the education of undocumented aliens because education is a local rather than federal concern.*

The second of the *De Canas* criteria for preemption mandates that state regulation of exclusively federal subject matters are invalid. However, the subject matter of the Texas statute, education, is one that has traditionally been a subject of state and local concern under state police powers. As this Court stated in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), "education is perhaps the most important function of state and local governments." And in *Milliken v. Bradley*, 418 U.S. 717 (1974), this issue was unmistakably put to rest:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.

Id. at 741-42. *See also, San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Unquestionably, education is historically, traditionally and primarily, an area of local rather than national concern. Section 21.031 therefore meets the second requirement under the *De Canas* preemption test.

C. *Section 21.031 of the Texas Education Code does not frustrate federal objectives in the areas of immigration and education.*

The third preemption test enunciated in *De Canas* requires the invalidation of state regulations that frustrate the purposes and objectives of a federal statutory scheme. However, *De Canas* clearly indicates that the federal objectives in enacting the Immigration and Nationality Act were aimed at controlling the "terms and conditions of admission to the country and the subsequent treatment of aliens *lawfully* in the country." 424 U.S. at 359. (Emphasis added.) The state's main objective in enacting section 21.031 was to protect the fiscal integrity of its educational funding. 628 F.2d at 459. Because of these divergent objectives, it is difficult to find any possible conflict between the state and federal schemes.

Although the Texas statute is not aimed at controlling immigration, it does have the effect of removing another incentive for undocumented aliens to immigrate by denying them a state-funded education. In this respect, section 21.031 may have an indirect impact on immigration. As this Court recognized in *De Canas*, however, an indirect impact on immigration does not render a state law constitutionally invalid as long as it is consistent with federal objectives. 424 U.S. at 355-56. The Texas statute, by removing one incentive to enter this country illegally, is actually furthering rather than frustrating the policies of the INA. Moreover, the Texas statute relies on an immigration status that is determined by federal law and does not require an independent state determination of immigration status. Consequently, there is no possibility of a state definition of "undocumented alien" or "lawfully admitted alien" that could conflict with the federal definitions of these terms. Section 21.031 is therefore entirely consistent with fed-

eral policies concerning the immigration of undocumented aliens.

Similarly, no federal objective with regard to the education of undocumented aliens is frustrated by section 21.031. Indeed, there is no clear indication that Congress has any policy on this issue. Title I of the Elementary and Secondary Education Act certainly evidences no such policy. Furthermore, because Congress has made state participation in the ESEA voluntary, it is unreasonable to argue that a state decision not to participate would frustrate congressional objectives.

Amicus has demonstrated that section 21.031 meets all the requirements established by this Court in *De Canas*. First, Congress has not expressed any intent to preempt the field of educating undocumented aliens; second, education is a matter of local rather than federal concern; and third, by restricting undocumented aliens from receiving a state-funded education, section 21.031 frustrates no federal policy with regard to the immigration or education of undocumented aliens. Section 21.031 of the Texas Education Code is therefore a valid exercise of state legislative power.

CONCLUSION

For all of the above reasons, Mountain States Legal Foundation urges this Court to reverse the Fifth Circuit's decision that section 21.031 violates the equal protection clause, and uphold the Fifth Circuit's decision that section 21.031 is not preempted by federal law.

Respectfully submitted,

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